KAMALAM v. COLISEUM HAIRWAVING SALOON & ANOR.

[F.C. (Ong C.J. (Malaya), Gill and Ali F.JJ.)
November 3, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. 38 of 1970]

Landlord and Tenant — Recovery of possession — Demolition for rebuilding purposes — Certificate obtained from Rent Assessment Board — Sub-tenants not parties in proceedings before board — Application for possession against tenant and sub-tenants — Whether order can be made against sub-tenants — Control of Rent Ordinance, 1956, ss. 8(1)(e) & 12(1)(m).

The appellant in this case being desirous of demolishing certain premises for the purpose of rebuilding applied for and obtained a certificate under section 8(1)(e) of the Control of Rent Ordinance, 1956, from the Rent Assessment Board. The sub-tenants were not joined as parties to the proceedings before the board but copies of the certificates were duly served on them. Subsequently the appellant issued a writ of action against the tenant and the sub-tenants, claiming possession of the premises under section 12(1)(m) of the Ordinance. The learned trial judge made an order for recovery of possession against the tenant, but dismissed the action against the sub-tenants. The appellant appealed against the dismissal of the action.

Held, allowing the appeal: so long as the sub-tenants were made parties to the action the court has the power to make an order for the recovery of possession as against them, even though they were not made parties to the proceedings before the Rent Assessment Board for the issue of a certificate under section 8(1)(e) of the Control of Rent Ordinance, 1956, which was the basis of the action for recovery of possession under section 12(1)(m) of the Ordinance.

Cases referred to:-

(1) *Guan Seng Kee Ltd.* v. *Buan Lee Seng Ltd.* [1954] M.L.J. 34.

(2) *Saint Andrew's Mission Hospital* v. *Wah Hin & Co. Ltd. & Ors.* [1968] 2 M.L.J. 169.

FEDERAL COURT.

R. R. Chelliah for the appellant.

K. K. Mah for the first respondent.

K. L. Devaser for the second respondent.

Gill F.J.: The appellant in this case was the plaintiff in the action in the High Court at Kuala Lumpur for the recovery of possession of premises No. 141, Jalan Tuanku Abdul Rahman, Kuala Lumpur, which at all material times were governed by the Control of Rent Ordinance, 1956. She had bought the premises in 1961 when the chief tenant of the premises was one Lee Pak Chim who was the first defendant to the action.

The first respondents to this appeal, being the second defendants in the court below, who were carrying on their business on the top floor of the premises, were then the first defendants' sub-tenants. On October 24, 1962 the plaintiff through her solicitors issued a notice to determine the first defendants' tenancy. On October 25, 1962 the second defendants as the partners of a firm known as Ban Huat & Co., which was carrying on business on the ground floor of the said premises, assigned the tenancy of that portion of the premises to the second respondents who were sued as the third defendants.

The plaintiff being desirous of demolishing the premises for the purpose of rebuilding, applied for and obtained on August 5, 1965 a certificate under section 8(1)(e) of the Ordinance from the Rent Assessment Board, Kuala Lumpur. The second and third defendants were not joined as parties to the proceedings before the board but copies of the certificate were duly served on all three defendants.

The defendants having failed to vacate the premises, the plaintiff on February 19, 1966 issued a writ of action which was duly served on the defendants. The first defendant did not enter an appearance and died in October, 1967. The action came on for trial in due course, and in the result an order for the recovery of possession was made against the first defendant as chief tenant, but the action was dismissed as against the second and third defendants. It was against such dismissal of the action that this appeal was brought.

It is to be observed that the plaintiff sought recovery of possession under section 12(1)(m) of the Ordinance which reads as follows: —

"12. (1) No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely —

(m) where the President or Chairman of the Board has certified that the Board is satisfied that the owner of the premises intends to demolish them for the purpose of rebuilding and in its opinion it is in the public interest that he should be permitted so to do;

Provided that an order or judgment shall not be made or given under this paragraph unless the Court is satisfied that the owner of the premises has complied with any order or conditions which the Board may have seen fit to make or impose;"

As I have already stated, the plaintiff prior to the commencement of her action had obtained from the Rent Assessment Board the certificate required under that section.

The board undoubtedly had the authority to issue that certificate under section 8(1)(e) of the Ordinance. As the second and third defendants were not made aware of the application which the plaintiff had made to the Board for the certificate, quite understandably they took no steps to be made parties to the proceedings before the board under section 8(5) of the Ordinance. It follows, therefore, that before issuing the certificate, it was not possible for the board, as required of them under section 8(6) of the Ordinance, to give the two defendants as interested parties an opportunity of being heard and of producing such evidence, oral or documentary, as might seem relevant to them. Nevertheless, it was open to the defendants to remedy the situation, when copies of the certificate were served on them, by making an application to the board under section 9(d) of the Ordinance, there being no time limit to the making of such application. The section reads as follows: —

"9. An order of the Board may be reviewed, varied or set aside by the Board in the following cases, namely —

(d) where the order was made in the absence of any necessary or proper party whose absence was not due to any default or neglect on his part;"

This they failed to do, with the result that the certificate became final and conclusive. In this connection the learned trial judge had this to say:

"In the present case the defendants had failed to take any step in that direction. They cannot now be allowed to say that they are still interested parties. They cannot take advantage of their own wrong. ... It is now too late for them to say that the said certificate is defective or unenforceable."

He went on to say that when a plaintiff comes to court armed with a certificate issued by the Rent Assessment Board under section 12(1)(m) of the Ordinance, neither the court nor the defendant can go behind the certificate.

It was argued on behalf of the two defendants in the court below and before us that no order for possession could rightly be made against them because of section 19(1) of the Ordinance which reads as follows: —

"19. (1) Where any order or judgment for the recovery of possession has been obtained against the tenant of any premises, such order or judgment shall not be enforceable against any sub-tenant of such tenant unless —

(a) the Court is satisfied that such tenant was prohibited by the terms of his tenancy from sub-letting or that such sub-tenant has used the premises for illegal or immoral purposes; and

(b) such sub-tenant has been made a party to the proceedings or has had an opportunity of being heard.

Every order or judgment for possession made against any tenant shall declare whether it shall be enforceable against any sub-tenant or not."

It is to be observed that that section speaks of an order or judgment for the recovery of possession of premises, which can only be made by the court. The Rent Assessment Board as such has no power to make any such order or judgment. It therefore follows that the requirement as regards a sub-tenant or sub-tenants being made a party or parties to the proceedings can only refer to the proceedings in court and not to any proceedings before the Rent Assessment Board. So long as the sub-tenants are made parties to the action the court has the power to make an order for the recovery of possession as against them, even though they were not made parties to the proceedings before the Rent Assessment Board for the issue of a certificate under section 8(1)(e), which undoubtedly is the very basis of an action for the recovery of possession under section 12(1)(m). In other words, as counsel for the appellant submitted both in the court below and here, section 19(1) does not apply to any proceedings before the Rent Assessment Board.

The learned trial judge presumably found some support from the decision of the Privy Council in *Guan Seng Kee Ltd.* v. *Buan Lee Seng Ltd.*[1] for his conclusion that the order for recovery of possession could not be enforced against the second and third defendants who had become the statutory tenants of the plaintiff. But the decision in that case rested on a different set of circumstances. There, recovery of possession was sought from the sub-tenants, who had remained in possession after the tenants had given up their contractual tenancy and gone out of possession, under exception 14(1)(i) of the Singapore Control of Rent Ordinance, 1947, which is in *pari materia* with section 12(1)(i) of our Ordinance. It was held that the sub-tenants being "tenants" within the meaning of section 16(a) of the Ordinance (section 20(a) of our Ordinance) read in the light of the definition in section 2, and that as the case could not be brought within any of the exceptions covered by section 14 of the Ordinance (section 12 of our Ordinance), no order for recovery of possession could be made against them. In the present case, however, the plaintiff quite clearly brought herself within exception 12(1)(m) of the Ordinance. The case of *Saint Andrew's Mission Hospital* v. *Wah Hin & Co., Ltd. & Ors.*,[2] which was also referred to by the learned trial judge, was in no way relevant to this case because the defendants here had not taken the point that they had not been served with a notice to quit.

For the reasons I have stated, we allowed the appeal with costs, set aside the order of the court below and substituted in its place an order that the defendants do give vacant possession of the premises.

Ong C.J. (Malaya) and **Ali F.J.** concurred.

Appeal allowed.

Solicitors: *R. R. Chelliah Bros.; Mah & Kok; K. L. Devaser & Co.*

UNITED INDIA FIRE & GENERAL INSURANCE CO. LTD. v. JAFFNESE CO-OPERATIVE SOCIETY LTD.

[F. C. (Ong C.J. (Malaya), Gill and Ali F.JJ.) November 3, 1970]

[Kuala Lumpur — Federal Court Civil Appeal No. 43 of 1970]

Landlord and Tenant — Controlled premises — Contractual tenancy put an end to by notice to quit — Premises ceasing to be controlled — Position of tenant — Whether such a tenant can sub-let the premises — Whether sub-tenants to whom premises sub-let protected — Control of Rent Act, 1966.

The plaintiffs (respondents in this appeal), the owners of certain premises, had given notice to quit to their tenants, the Indian Overseas Bank. After the expiry of the notice to quit, the bank continued to occupy the premises. Subsequently they purported to sublet a portion of the premises to the second defendants/appellants. In an action by the respondents against the bank and the sub-tenants the High Court gave judgment in favour of the respondents on the ground that the bank was a statutory tenant and as such had no power to sublet the premises, so that when the tenant gave up possession of the premises, the subtenant was not protected. The second defendants appealed.

Held, dismissing the appeal: the effect of the Control of Rent Act, 1966 is to abolish "statutory tenancies". Under the Act a contractual tenant who is no longer such after the determination of his contractual tenancy holds over only by virtue of the protection approved by section 16(1) of the Act and nowhere in the Act is there any provision enabling the tenant to transmit his own privilege of irremovability to a third party, whether by assignment or subletting.

Cases referred to:-

(1) *Roe* v. *Russell* [1928] 2 K.B. 117, 130.

(2) *Oak Property Company Ltd.* v. *Chapman* [1947] 1 K.B. 886.